

## Message Text

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SUBJECT: DRAFT CONVENTION FOR THE PREVENTION AND SUPPRESS-  
ION OF TORTURE (SWEDISH AND EXPERTS' DRAFTS)

REF: GENEVA 02119

1. FOLLOWING POINTS ARE RAISED TO ASSIST US DEL IN  
INITIAL EXPLORATION AND PRELIMINARY DISCUSSIONS WITH  
OTHER DELEGATIONS REGARDING SUBJECT DRAFTS.  
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2. EXPERTS ARTICLE 1. IN PRINCIPLE, DEPT SEES NO LEGAL  
OBJECTION TO PROPOSED ART (STATING TORTURE IS A CRIME  
UNDER INTERNATIONAL LAW), AS LONG AS THE CONVENTION IS  
OTHERWISE SATISFACTORY (E.G., PROVIDES APPROPRIATE  
PROCEDURES FOR TRIAL AND PUNISHMENT OF TORTURERS).

HOWEVER, FEAR ART COULD DELAY ACHIEVING GOOD  
TREATY (THE GENOCIDE CONVENTION HAS A PARALLEL TEXT:  
"THE CONTRACTING PARTIES CONFIRM THAT GENOCIDE, WHETHER  
COMMITTED IN TIME OF PEACE OR IN TIME OF WAR, IS A CRIME  
UNDER INTERNATIONAL LAW...." WE RECOGNIZE GENOCIDE MAY  
BE A SPECIAL CASE IN VIEW OF NURNBERG PRECEDENT AND THE  
MORE RESTRICTIVE JURISDICTIONAL REACH OF ART VI OF  
GENOCIDE CONVENTION. POINT THAT TORTURE IS UNIVERSALLY

CONDEMNED MIGHT BETTER BE MADE IN PREAMBLE (RATHER THAN  
BODY OF CONVENTION) WITH APPROPRIATE RECITATION OF  
IMPRESSIVE RECORD THIS FACT. PURPOSE OF THIS CONVENTION  
IS TO PROVIDE A DETAILED TREATY FOR TRIAL AND PUNISHMENT  
OF TORTURERS IN NATIONAL COURTS. WE THINK THERE IS A  
RISK OF DETRACTING FROM THIS PURPOSE IF CONVENTION  
CONTAINS LANGUAGE (SUCH AS EXPERTS ART 1) WHICH COULD  
RAISE QUESTION WHETHER THIS CONVENTION ALTERS EXISTING  
GENERAL INTERNATIONAL LAW ON TRIAL AND PUNISHMENT OF  
TORTURERS. UNDERSTAND THAT SUCH AN ARTICLE WAS LEFT OUT  
OF HIJACKING CONVENTION FOR SIMILAR REASONS. THE  
DISCUSSION ON ART 19 OF THE INTERNATIONAL LAW COMMISSION  
DRAFT ON STATE RESPONSIBILITY (A/31/370, 10 DEC 1976)  
INDICATES THE PROBLEMS AND DISTRACTION SUCH LANGUAGE  
COULD CREATE.)

3. DEFINITION - EXPERTS ART 2. IN ORDER TO MAKE TORTURE  
A TREATY OFFENSE FOR PURPOSES OF OUR CONSTITUTION, WE  
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BELIEVE MORE SPECIFIC LANGUAGE SHOULD BE USED. SUGGEST  
SUBSTITUTE FOR QUOTE TORTURE IS UNQUOTE IN FIRST SENTENCE,  
THE WORDS QUOTE A PERSON COMMITS THE OFFENSE OF TORTURE  
UNDER THIS TREATY IF HE ENGAGES IN UNQUOTE. ALSO NOTE  
THAT MOTIVES LISTED IN EXPERTS' DRAFT AS PART OF  
DEFINITION ARE EXCLUSIVE UNLIKE NONEXCLUSIVE LANGUAGE OF  
SWEDISH DRAFT "FOR SUCH PURPOSES AS" (ARTICLE 1). DEPT  
PREFERS SWEDISH DRAFT LANGUAGE ON THIS POINT. HOWEVER,  
ALSO NOTE ARTICLE II(C) EXPERTS' DRAFT WHICH DESCRIBES  
THE MOTIVE OF INFLECTING "PUNISHMENT ON THAT PERSON OR  
ANOTHER PERSON." LANGUAGE COVERING THE OTHER PERSON IS  
MISSING FROM SWEDISH DRAFT AND SHOULD BE INCLUDED IN  
CONVENTION TEXT.

4. EXTRADITION.

(A) EXPERTS ART X(2) US SHOULD NOT UNDERTAKE TO EXTRA-  
DITE IN ABSENCE OF PROCEDURAL SAFEGUARDS OF USUAL EXTRA-  
DITION TREATIES AND THESE ARE NOT SUPPLIED BY PRESENT  
DRAFT. SEE FOR EXAMPLE GENOCIDE CONVENTION, ART 7.

(B) EXPERTS ART X (1) ASSUME THIS PROVISION IS INTENDED  
TO PERMIT REQUESTED STATE TO REFUSE EXTRADITION WHERE

IT IS ALREADY TRYING OR PUNISHING OFFENDER.

(C) EXPERTS ART IV(F) SINCE PRESENT EXTRADITION TREATIES DO NOT SO PROVIDE, WOULD APPEAR NECESSARY LIMIT REACH OF ARTICLE TO EXTRADITION TO OTHER STATES PARTIES TORTURE CONVENTION AND SUCH OTHER REQUESTING STATES AS HAVE NO CONFLICTING TREATY CLAIM.

(D) SWEDISH ART 4 DRAFT. GROUNDS FOR REFUSING EXTRADITION APPEAR UNCONSTITUTIONALLY VAGUE IN THAT CRUELTY, INHUMANE OR DEGRADING TREATMENT OR PUNISHMENT IS NOT FURTHER DEFINED. MOREOVER, SAME PROBLEMS EXIST HERE AS IN (C) ABOVE WITH RESPECT TO EXISTING EXTRADITION TREATY OBLIGATIONS THAT LACK THIS EXCEPTION.

(E) IT MAY ALSO BE ADVISABLE TO INCORPORATE EXTRADITION PROVISION SIMILAR TO SABOTAGE CONVENTION, ARTICLE 8(4) LIMITED OFFICIAL USE

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WHICH INTERRELATES EXTRADITION AND JURISDICTION. NEITHER DRAFT PRESENTLY HAS SUCH LANGUAGE. INDEED ARTICLE 8 OF THE SABOTAGE CONVENTION MIGHT BE A USEFUL MODEL FOR THE ENTIRE EXTRADITION PROVISION OF THE TORTURE CONVENTION.

5. EXPERTS ART VII. DEPT PREFERS THIS PROVISION WHICH, UNLIKE SWEDISH DRAFT (ART 13) ALLOWS STATEMENT OBTAINED BY MEANS OF TORTURE TO BE USED IN PROCEEDINGS AGAINST THE ACCUSED TORTURER (AS RES GESTAE).

6. JURISDICTION.

(A) EXPERTS ART IX(1) AND SWEDISH ART 8(1). IX(1)(A) AND (B) NO PROBLEM. IX(1)(D) HAS PRECEDENT IN HIJACKING CONVENTION, BUT THERE IS LESS PROBABILITY IN TORTURE SITUATION THAT ACCUSED WOULD ARRIVE WITH WITNESSES AND APPURTENANCES OF CRIME. IX(C) SEEMS LIKELY TO GIVE US REAL TROUBLE DUE TO SAME PROBLEMS AND FACT THERE IS NO PRECEDENT FOR IT. SAME APPLIES TO ART 8(1)(C) OF SWEDISH DRAFT.

(B) LANGUAGE OF SWEDISH DRAFT THAT REQUIRES A STATE PARTY TO "TAKE SUCH MEASURES AS MAY BE NECESSARY TO ESTABLISH ITS JURISDICTION" (ART 8(1) MAY BE PREFERABLE TO EXPERTS' DRAFT LANGUAGE THAT "JURISDICTION...SHALL VEST" (ART IX(1)). WE DO NOT UNDERSTAND PURPOSE OF GIVING PRIORITY TO CERTAIN TYPES OF JURISDICTION AS DONE IN ART IX(1) EXPERTS' DRAFT.

7. EXPERTS ART XII. THIS PROVISION (WHICH WE ASSUME IS INTENDED TO PREVENT OBJECTIONS TO EXTRADITION) COULD USEFULLY BE INCORPORATED INTO THE CONVENTION AND SHOULD NOT BE OVERLY CONTROVERSIAL AS IT APPEARS IN THE GENOCIDE CONVENTION (ART VII).

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8. SUGGEST PROVIDING THAT ARTICLES XIII AND XIV OF EXPERTS' DRAFT WILL BECOME OPERATIVE FOR A PARTY NOT ALSO PARTY TO CIVIL AND POLITICAL COVENANT ONLY UPON DECLARATION OF ACCEPTANCE OF THOSE ARTICLES BY SUCH PARTY. SIMILAR PROVISION SHOULD BE MADE FOR ART 16 OF SWEDISH DRAFT WITH RESPECT TO STATES NOT PARTIES TO CIVIL AND POLITICAL COVENANT. ALTERNATIVELY, CONVENTION

MIGHT REQUIRE STATES NOT LINKED WITH HUMAN RIGHTS COMMITTEE TO REPORT UNDER SOME OTHER PROCEDURES.

9. INTERNATIONAL IMPLEMENTATION.

(A) THERE IS A MAJOR DIFFERENCE IN APPROACH TO INTERNATIONAL MEASURES OF IMPLEMENTATION IN EXPERTS ART XII AND SWEDISH ARTS 16, 17, 18 AND 20. EXPERTS' DRAFT WOULD REGULARIZE REPORTING BY STATES ON MEASURES THEY HAVE TAKEN TO IMPLEMENT THE CONVENTION. UNDER SWEDISH DRAFT, STATES WOULD REPORT ONLY WHEN REQUESTED BY THE HUMAN RIGHTS COMMITTEE.

(B) PRIMARY FOCUS OF EXPERTS DRAFT IS MECHANISM FOR REVIEW OF REPORTS THAT STATES THEMSELVES ARE REQUIRED TO SUBMIT ABOUT THEIR OWN IMPLEMENTATION. THIS RAISES QUESTION OF IMPOSING REQUIREMENTS UNDER THIS CONVENTION

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(E.G., ART XIII (3)) ON HUMAN RIGHTS COMMITTEE ESTABLISHED BY CIVIL AND POLITICAL COVENANT. UNDER SWEDISH DRAFT THE HUMAN RIGHTS COMMITTEE MAY CARRY OUT AN INQUIRY IF IT RECEIVES INFORMATION ON SYSTEMATIC TORTURE IN A STATE PARTY. SWEDISH PROVISION IS ACCEPTABLE SO LONG AS QUALIFICATIONS IN ARTS 18(1) AND 20(1) REMAIN IN

CONVENTION.

10. EXPERTS ART XIV (DISPUTE SETTLEMENT). DEPT IS NOT COMMENTING AT THIS TIME. POSSIBILITY OF USE OF ICJ BY ADVISORY OPINION ROUTE SHOULD BE CONSIDERED. NOTE EXPERTS' DRAFT USES ICJ MECHANISM (AT ONE PARTY'S REQUEST) WHILE SWEDISH DRAFT REFERS TO CONCILIATION COMMISSION (AFTER CONSENT BY PARTIES CONCERNED).

11. WHAT APPEARS TO BE SIGNIFICANCE AND EFFECT OF "GRAVE CRIME" AT IV(A) OF EXPERTS' DRAFT?

12. FURTHER GUIDANCE WILL BE PROVIDED ASAP.  
CHRISTOPHER

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